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No. 79-1229

In the Supreme Court of the United States

OCTOBER TERM, 1979

GERALD N. KLAUBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 611 F. 2d 512.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1979. A petition for rehearing was denied on January 9, 1980 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on February 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's refusal to order the government to grant immunity to a prospective defense witness denied petitioner a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341, and racketeering, in violation of 18 U.S.C. 1962(c). He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-16a).

The evidence at trial showed that petitioner, an attorney, engaged in a scheme to defraud insurance companies through the submission of false information concerning disability and medical expenses in support of personal injury claims. Petitioner used inflated medical bills and exaggerated medical reports to obtain settlements for his clients from insurance carriers (Pet. App. 2a).

Thirteen of petitioner's former clients testified that they had been injured in automobile accidents and that petitioner settled their claims. All confirmed that their medical bills were false and that the number of reported medical treatments was substantially inflated (Tr. 136-176, 180-205, 314-344, 440-500, 500-523, 524-570, 571-617, 617-645, 744-752, 722-795, 815-861, 1367-1389, 1496-1520). In addition, four doctors admitted furnishing petitioner falsified medical bills and reports (Tr. 1972-1974).

At trial, petitioner asserted that he wished to call Michael Simons to the witness stand but could not do so because Simons would claim his Fifth Amendment privilege as to every substantive question.[1] Petitioner

[1]Petitioner's counsel stated that he had spoken to Simons' counsel and was informed that Simons would assert his Fifth Amendment privilege.

therefore requested that the trial court require the government to grant use immunity to Simons to testify in petitioner's behalf. Simons, a former associate in petitioner's law firm, had testified under a grant of use immunity before the grand jury that indicted petitioner. Petitioner's offer of proof consisted of three points: (1) that Simons did not discuss inflated medical bills with one of the physicians who testified for the government; (2) that certain law firm records had been destroyed to conserve space, not to conceal incriminating evidence; and (3) that petitioner had nothing to do with the destruction of the firm's records (Pet. App. 3a). Petitioner's request to compel the government to grant Simons use immunity was denied by the district court.

ARGUMENT

Petitioner contends (Pet. 9-19) that he was denied a fair trial by the district court's refusal to compel the government to grant immunity to Simons as a prospective witness. As the court of appeals noted, however, it is doubtful whether this issue is properly presented in this case (Pet. App. 9a). The evidence petitioner wished to adduce may well have been available to him without a grant of immunity through use of Simons' grand jury testimony—which petitioner did not seek to obtain or introduce at trial.[2]

[2]As the court of appeals observed (Pet. App. 5a-9a), petitioner did not offer Simons' grand jury testimony as substantive evidence under Fed. R. Evid. 804(b)(1). That rule provides that if a declarant is unavailable as a witness, testimony that he has given as a witness at another hearing is not excluded by the hearsay rule if the party against whom the testimony is offered had an opportunity to develop the testimony by direct, cross, or redirect examination. Since the government examined Simons at the time he testified before the grand jury, petitioner may have been able to offer that testimony as

In any event, it is well settled that a criminal defendant has no general right to obtain immunity for defense witnesses. See, *e.g.*, *United States* v. *Lang*, 589 F. 2d 92, 95-96 (2d Cir. 1978); *In re Kilgo*, 484 F. 2d 1215, 1222 (4th Cir. 1973). The federal courts have repeatedly recognized that authority to apply for immunity is vested solely in the prosecutor. *United States* v. *Benveniste*, 564 F. 2d 335, 339 n.4 (9th Cir. 1977); *United States* v. *Housand*, 550 F. 2d 818, 824 (2d Cir. 1977); *In re Daley*, 549 F. 2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F. 2d 1302, 1315 (8th Cir. 1977); *United States* v. *Allstate Mortgage Corp.*, 507 F. 2d 492, 494-495 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975); *In re Kilgo, supra; Earl* v. *United States*, 361 F. 2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967).

We recognize that several courts have suggested that under special circumstances a district court may impose sanctions for failure of the government to respond affirmatively to a request that a prospective defense witness be immunized.[3] See *United States* v. *Morrison*,

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substantive evidence at trial. Fed. R. Evid. 804(a)(2) specifically provides that "unavailability" includes cases in which the declarant is exempted from testifying on the ground of privilege. Petitioner at no time made any effort to obtain or introduce Simons' grand jury testimony.

[3]In addition to the possibility of sanctions, the Third Circuit has suggested the existence of an inherent power in the district court to immunize witnesses in extraordinary situations. See *United States* v. *Herman*, 589 F. 2d 1191, 1204 (3d Cir. 1978). While we submit that this conclusion is inconsistent with longstanding principles of separation of powers (see *In re Daley*, *supra*, 549 F. 2d at 479), that question is not presented here. Even if such a power exists, petitioner does not claim that the circumstances here required its exercise. Indeed, in the district court, petitioner's counsel expressly disavowed

535 F. 2d 223 (3d Cir.), cert. denied, 429 U.S. 824 (1976); *United States* v. *De Palma*, 476 F. Supp. 775, 778 (S.D. N.Y. 1979). Even if this view accurately embodies applicable law, however, the circumstances necessary for imposition of sanctions were not present in this case.

In *United States* v. *Morrison*, *supra*, an otherwise willing defense witness was driven to invoke her Fifth Amendment privilege by prosecutorial misconduct. The

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reliance on the court's power in that regard, arguing only that the court should order the government to seek immunity (Tr. 1919-1921).

The Third Circuit's recent decision in *Government of the Virgin Islands* v. *Smith*, No. 79-1212 (Feb. 5, 1980), does not conflict with the decision of the court of appeals in this case. The Third Circuit held in *Smith* that "[w]hen the court finds prosecutorial misconduct by the government's deliberate intent to disrupt the factfinding process, it should order the government to grant statutory immunity to the defense witness * * *" (slip op. 20). In the present case, the court of appeals specifically found that "[t]he government's unwillingness to immunize the witness * * * [did] not amount to bad faith, nor did it lead to unfairness to Klauber" (Pet. App. 14a). The Third Circuit's decision in *Smith* also held that "when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding use immunity, the court should grant judicial immunity * * *" (slip op. 20). The court added that "[i]mmunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses" (slip op. 16). In the present case, the court of appeals found that the evidence proffered by petitioner was cumulative and not clearly exculpatory. There is thus no conflict with *Smith*, as the Third Circuit stressed: "The standards formulated here take into account the objections to judicial immunity which have recently been expressed in the opinions of other courts of appeals. For example, in *United States* v. *Klauber*, * * * the Fourth Circuit * * * noted that the defense witness had not appeared in court, that there was no showing that the witness would be able to claim the fifth amendment privilege and that the defendant had made no showing as to what the content of the proffered testimony would be—let alone whether it would be exculpatory. * * * *Klauber* * * * [is] not inconsistent with the result reached in this opinion." Slip op. 16 n.13.

court of appeals found that the defendant's right to a fair trial had been denied by the prosecutor's misconduct. The court held that the government must request use immunity for the witness if she refused to testify on remand, and that in the absence of such a request by the government the district court should enter a judgment of acquittal. See 535 F. 2d at 229. In this case there is no suggestion that Simons' refusal to testify resulted from prosecutorial misconduct, and there was thus no occasion for the special remedy fashioned in *Morrison*.

Petitioner does not argue to the contrary, but instead relies on the district court's decision in *United States* v. *De Palma*, *supra*. In *De Palma*, the government chose to obtain immunity for two of four individuals involved in a securities fraud, denying a defense request that the other two be given immunity. The district judge found that it was a denial of due process for the government to pick and choose among those persons directly involved in the crime who could shed light on the culpability of the defendant. The court therefore held that the testimony of the two witnesses the government proposed to call should not be received unless the government requested immunity for the other two witnesses. The decision of the district court in *De Palma* has been appealed by the government, No. 79-1315 (2d Cir.).

The approach of the district court in *De Palma* does not conflict with that of the court of appeals here. The only immunized witness for the government whose testimony related to that which Simons could provide was Roger Powell, another associate in petitioner's law firm. Powell's testimony related to the alleged destruction of law firm records (Tr. 1487-1488). The court below correctly pointed out that this situation was not akin to *De Palma*, where both the government's immunized witnesses and

the prospective defense witnesses were centrally involved in the charged offense and could provide essential evidence (Pet. App. 13a):

> [Powell's] involvement was peripheral, not central, to the matters charged, as was the case with the witnesses in *De Palma*. Simons' testimony would similarly go to secondary, not primary matters. * * *
>
> Other witnesses, two * * * former associates, Samuel Blibourn and Paul Gibbons, testified that Powell was a liar. The essential thrust of the Simons testimony which [petitioner] sought to obtain through use immunity was, therefore, cumulative.

Finally, it must be noted that the district court in *De Palma* did not rule that the witness whose testimony was sought by the defendant had to be immunized. Rather, the court held that the testimony of an immunized government witness could not be received. Since petitioner did not seek to condition the receipt of Powell's testimony on a grant of immunity to Simons, he failed to preserve this point for review (Pet. App. 12a-13a & n.12).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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